Supreme Court, U.S.
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No. 99-395

IN THE

Supreme Court of the United States

VANESSA ARMSTRONG,

Petitioner,

v.

ACCREDITING COUNCIL FOR CONTINUING EDUCATION AND TRAINING, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS EDUCATIONAL CREDIT MANAGEMENT CORPORATION AND CALIFORNIA STUDENT LOAN FINANCE CORPORATION AND BANK OF AMERICA, N.A.

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QUESTION PRESENTED

Whether the 1988 statutes and regulations governing the federal Guaranteed Student Loan Program preempt a claim based upon alleged school misconduct brought under D.C. Code § 28-3809(a) to cancel a student loan obtained in 1988, where the student loan was both approved by the United States Department of Education and contained no language allowing the assertion of school-based claims against holders of the promissory note.

PARTIES TO THE PROCEEDINGS BELOW AND STATEMENT PURSUANT TO RULE 29.6

Respondents California Student Loan Finance Corporation, Bank of America NT&SA, now known as Bank of America, N.A., and Educational Credit Management Corporation accept the Petitioner's recitation of the Parties to the Proceeding below, but add to the statement the following corporate disclosures.

California Student Loan Finance Corporation is a California nonprofit public benefit corporation. It has no parent corporation nor any publicly held company owning 10% or more of its stock.

Bank of America, N.A., is a wholly owned subsidiary of Bank of America Corporation, a publicly held corporation.

Educational Credit Management Corporation is a Minnesota not for profit corporation. It has no parent corporation nor any publicly held company as a member.

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STATEMENT OF THE CASE

In the decision below, the District of Columbia Circuit held that the federal law governing the Guaranteed Student Loan Program ("GSLP") as it existed in 1988 preempted the Petitioner's claim to have her 1988 student loan declared unenforceable under a portion of the District of Columbia Consumer Protection Act due to the alleged misconduct of the school she chose to attend with the proceeds of that loan. (Petitioner's Appendix at 15a-16a). In reaching its decision, the D.C. Circuit specifically recognized that changes to the program which occurred in 1992 and 1993 would require a different result if this case involved a loan made after those changes were enacted. (Petitioner's App. at 6a).

As will be shown below, the Petitioner's Petition for a Writ of Certiorari should be denied, because none of the suggested bases for granting the Petition which are articulated in Rule 10 of the United States Supreme Court Rules are present here. Effective January, 1994, the United States Department of Education ("DOE") required all GSLP lenders to use a standard form promissory note containing contractual language allowing student loan borrowers to raise school-based misconduct claims and defenses in certain circumstances. This new requirement has rendered the preemption issue asserted in this case moot for loans made within the last five and a half years. Consequently, there simply is no "important issue" involved in this case. Moreover, contrary to the Petitioner's arguments, the D.C. Circuit's ruling did not conflict with any prior decisions of this Court, nor with any decisions of any other Circuit Court of Appeals. In fact, every appellate court which has addressed the issue before the Court has consistently rejected the far-reaching relief sought by the Petitioner.

A. The Guaranteed Student Loan Program

The Guaranteed Student Loan Program ("GSLP") was established pursuant to the provisions of the Higher Education Act of 1965 ("the HEA"), 20 U.S.C. § 1071, *et seq.* (1988).[1] The HEA provides a comprehensive federal scheme which governs the guaranty agency portion of GSLP.[2] Under that program, lenders use their own funds to make Guaranteed Student Loans ("GSLs") to eligible students. These loans are guaranteed against default by "guaranty agencies," which are either state agencies or private not-for-profit entities which are established to administer and guarantee student loans. 20 U.S.C. § 1078(c) (1988). In the event a student defaults in repaying his or her loan, a guaranty agency pays the holder of the loan under the terms of its guarantee. At various times, the holder of

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1. In 1992, the GSLP program was renamed the "Federal Family Education Loan Program." Pub. L. No. 102-325, § 411, 106 Stat. 510 (1992). The Circuit Court's opinion used the name of the program as it existed in 1988, which will be followed in this response.

2. At the time the plaintiff obtained her loan in 1988, the GSLP included the guaranty agency program and the Federally Insured Student Loan Program (the "FISLP"). 20 U.S.C. § 1071(a) (1988); 34 C.F.R. § 682.100(a) (1988). The loans at issue here were made under the guaranty agency program, not the FISLP. A primary distinction between the two programs is that under the guaranty agency program, an independent guaranty agency insured the loans; under the FISLP, the Department of Education extends a guarantee to the lender to protect it against a borrower's default. The FISLP is only authorized to operate in states not served by a guaranty agency program or, in limited circumstances, in states in which a guaranty agency program does not serve all eligible students. 20 U.S.C. § 1071(a)(1)(B) (1988); 34 C.F.R. § 682.100(a)(3) (1988).

the student loan may be different than the original lender, as there are secondary market entities, such as respondent California Student Loan Finance Corporation ("CSLFC"), a California non-profit secondary market, which purchase loans from lenders, thereby providing additional funds for lenders to make student loans. As a tax exempt secondary market, CSLFC is legally obligated to purchase GSLs of any eligible student from lenders on a nondiscriminating basis, i.e., on the same terms, for all eligible students, without regard to the student's choice of school. 20 U.S.C. §§ 1087-1(e)(2)(D), (e), and (f) (1988); 34 C.F.R. § 682.840 (1988).

After a guaranty agency pays the holder of the loan under the terms of its guarantee, the guaranty agency obtains possession of the loan and is obligated to pursue collection efforts against the defaulting borrower. 34 C.F.R. § 682.102(c) (1988). The guaranty agency is reimbursed on a sliding scale for the funds it expends on lender's claims pursuant to its reinsurance agreement with the United States Department of Education ("DOE").

Institutions of higher education and vocational schools, as defined in the HEA, are entitled to participate in the GSLP. The HEA contemplates participation in the GSLP by all types of institutions of higher education. Under the HEA, "institutions of higher education", including "vocational schools", are schools accredited by a nationally recognized accrediting agency approved by the DOE or, where there is no agency, by a State-recognized agency or an advisory committee approved by the DOE. 20 U.S.C. §§ 1085(b)(5) and (c)(4) (1988).

In order to participate in the program, a school must first obtain a certification from the DOE that the school qualifies

as an "eligible" school. 34 C.F.R. § 682.600(a)(1) (1988); *see also* 20 U.S.C. §§ 1085(a)-(c) (1988). To obtain that certification, the school must meet the DOE standards governing the eligibility of the educational programs, which require the school to be accredited by a nationally recognized accrediting agency and licensed by the State in which it is located. 34 C.F.R. § 668.7 (1988). Lenders and guaranty agencies do not participate in designating schools as eligible to participate in the program. After certification by the DOE, the school must enter into a written program participation agreement with the DOE. 34 C.F.R. § 682.600(a)(2) (1988). Neither the guaranty agency nor the lenders are parties to the program participation agreement.

Only after all the foregoing steps are completed can a school's prospective students obtain GSLs. Typically, a borrower obtains a GSL by obtaining an application from his or her chosen school, completing the application, and giving the application to the school. The school then certifies it and forwards it to a participating lender. 34 C.F.R. § 682.102(a) (1988). Certification consists of the school certifying the borrower's eligibility for a loan, the student's estimated cost of attendance, and the student's estimated financial assistance. 34 C.F.R. § 682.603 (1988). The student rarely has any face-to-face contact with the lender. *See* 54 Fed. Reg. 24125 (June 5, 1989) (comments of the DOE stating that lenders have no responsibility for in-person counseling of borrowers since they often have no face-to-face contact with borrowers). In the event that a participating school engages in misrepresentations to students about its programs, the DOE can take steps against the wrongdoing school by fining the school, or suspending, limiting or terminating the school's participation in the program. 34 C.F.R. § 668.71-.75 (1988).

After accepting a GSL, a borrower is required to repay that loan in accordance with the terms of the loan. 34 C.F.R. § 682.102 (1988). Prior to 1994, the terms of GSL loans, such as Petitioner's loan, were set forth in form promissory notes that were prepared by guaranty agencies and reviewed and approved by the DOE. 34 C.F.R. § 682.401(d)(1) (1988). Without approval by the DOE, the form promissory note could not be modified by lenders. 34 C.F.R. § 682.206(d)(2) (1988).

Failure to make installment payments when due for 180 days constitutes a "default" of the debtor's obligation, 34 C.F.R. § 682.200 (1988), entitling the holder to reimbursement from the guaranty agency. 20 U.S.C. § 1078(c) (1988); 34 C.F.R. § 682.102 (1988). After the guaranty agency reimburses the holder of a defaulted loan, the agency is obligated to pursue collection efforts against the borrower. 34 C.F.R. § 682.102(c) (1988).

Lenders participating in the GSLP are statutorily prohibited from discriminating against any applicants in providing GSL loans. 20 U.S.C. § 1071(a)(2) (1988). In the event a lender fails to comply with the statutes and regulations governing the program, the DOE can take steps to suspend, limit or terminate the lender's participation in the GSLP. 34 C.F.R. § 682.700, *et seq.* (1988). Similarly, the HEA specifically provides that the agreement between the DOE and a guaranty agency shall set forth adequate assurances that the guaranty agency will not engage in any practice which discriminates against borrowers or which results in a denial of a borrower's access to loans because of his or her attendance at a particular eligible institution within the area served by the guaranty agency. 20 U.S.C. § 1078(c)(2)(F) (1988).

Prior to 1992, the only specified bases under the GSLP for discharging a GSL was if the borrower died, became disabled or received a bankruptcy discharge. 20 U.S.C. § 1087 (1988); 34 C.F.R. § 682.402 (1988). In 1992, Congress amended the HEA to allow borrowers to seek discharges of GSLs received on or after January 1, 1986 which were used to attend an eligible institution that either (1) closed and thereby prevented the borrower from completing the program, or (2) falsely certified the borrower's eligibility to borrow under the GSLP. Pub. L. No. 102-325, sec. 428, 20 U.S.C. § 1087(c). At the same time, Congress made schools with excessive default rates ineligible to participate in the GSLP. Pub. L. No. 102-325, sec. 427(a), 20 U.S.C. § 1085(a)(2).

While it certainly has had the opportunity to do so, Congress has never stated, nor even suggested, that lenders and guaranty agencies should generally be subjected to claims of school misconduct, because neither lenders nor guaranty agencies are responsible to oversee the educational operations of eligible institutions. In fact, in promulgating new rules under the 1992 statutory amendments, the Secretary specifically noted that a school's misrepresentations about its educational program or placement services was not the type of "school malfeasance . . . that would permit a borrower to receive a loan discharge under the HEA." 59 Fed. Reg. 22471 (April 29, 1994).

In 1988, there were also no regulations which allowed a borrower to assert claims or defenses relating to school misconduct as a defense to repaying a GSL guaranteed by a guaranty agency. However, beginning in 1994 the DOE required, for the first time, the use of a standard promissory note which contained a contractual provision allowing student

loan borrowers who attend proprietary schools to assert school based claims or defenses against the holders of their loans in certain limited circumstances. *See* Pub. L. 102-325, § 425(e), 20 U.S.C. § 1082(m)(1) (portion of 1992 statutory amendments requiring the development of a "common application form and promissory note"). This contractual language was based on the Federal Trade Commission's "Holder Rule Notice" (hereinafter the "FTC Rule"), which is a notice the FTC requires to be included in certain consumer contracts under the provisions of 16 C.F.R. § 433.1. (Petitioner's App. at 6a). In such cases, this contractual language allows a GSL borrower to assert the same defenses he or she may have against the school directly against the holder of his or her loan in defense to a collection action brought to enforce the loan. Such language was completely absent from the petitioner's 1988 loan, the form of which had been approved by the DOE as required by 34 C.F.R. § 682.401(d)(1) (1988). Moreover, when the DOE began to require such language in student loan promissory notes, it provided lenders with advance notice and guidance several months beforehand, so that lenders could review their lending practices and/or discontinue making loans to students attending proprietary schools in order to protect themselves from school misconduct defenses. (Petitioner's App. at 6a-7a).

B. The Decision Below

Petitioner enrolled in a vocational school, NBS Automotive School in the District of Columbia, which she alleges engaged in misrepresentation to induce her and other students to enroll. (Petitioner's App. at 8a). NBS filed for bankruptcy in 1990. In 1991, plaintiff Armstrong brought this case against those parties that claimed a right to enforce her NBS loan, alleging that she and other students were entitled to raise NBS's fraud as a defense to enforcement of the student loans because of NBS's role in

the plaintiff's procurement of her loan. (Petitioner's App. at 8a).

In addition to asserting a number of claims that were also dismissed and are not involved in her Petition for Writ of Certiorari, the Petitioner asserted a claim relying on a District of Columbia statute which provides that "[a] lender who makes a direct installment loan for the purpose of enabling a consumer to purchase goods or services is subject to all claims and defenses of the consumer against the seller if" the lender "acts at the express request of the seller" *and* "the seller participates in preparation of the loan instrument." D.C. Code § 28-3809(a)(1). (Emphasis added). This claim is the only claim at issue before this Court.

In a 1993 opinion dismissing this claim, the district court concluded that relief under the District of Columbia statute is preempted because federal law permits schools to perform certain loan making functions, and applying the D.C. statute would attach liability to "functions that clearly are contemplated by the HEA." *Armstrong v. Accrediting Council for Continuing Education and Training*, 832 F. Supp. 419, 430-31 (D.D.C. 1993).[3] The District Court also held that it would be inconsistent with the HEA to impose liability on an innocent loan purchaser such as CSLFC for alleged school misconduct because the HEA required CSLFC to purchase plaintiff's loan regardless of her choice of school. *Id.* 832 F. Supp. at 427. On appeal, the Circuit Court vacated

3. In reaching this conclusion, the District Court relied on another decision of the United States District Court finding the very same statute preempted by the Higher Education Act. *Jackson v. Culinary School of Washington*, 788 F. Supp. 1233 (D.C. Cir. 1993), *rev'd on other grounds*, 27 F.3d 573 (D.C. Cir. 1994), *vacated*, 115 S. Ct. 2573 (1995), *on reconsideration*, 59 F.3d 254 (D.C. Cir. 1995). There are no decisions to the contrary.

the judgment and remanded the case for the District Court to expressly consider whether it should exercise jurisdiction over the pendent state law claims under 28 U.S.C. § 1367, since petitioner's claim under federal law had been dismissed on other grounds. *Armstrong v. Accrediting Council for Continuing Education and Training*, 84 F.3d 1452 (D.C. Cir. 1996). (Petitioner's App. at 9a-10a, 27a). On remand, the District Court decided to exercise supplemental jurisdiction. *Armstrong v. Accrediting Council for Continuing Education & Training*, 950 F. Supp. 1 (D.D.C. 1996). Thereafter, the District Court once again granted defendants' motions to dismiss, but did not reach the issue of preemption of the District of Columbia statute because it agreed with defendants that a choice of law clause in the loan contract made the D.C. statute inapplicable. *Armstrong v. Accrediting Council for Continuing Education & Training*, 980 F. Supp. 53 (D.D.C. 1997). (Petitioner's App. at 29a-35a)[4].

On appeal, the District of Columbia Circuit held that regardless of whether the D.C. statute was applicable or not, federal law preempted D.C. Code § 28-3809. *Armstrong v. Accrediting Council for Continuing Education & Training*, 168 F.3d 1362 (D.C. Cir. 1999), *amended*, 177 F.3d 1036 (D.C. Cir. 1999). (Petitioner's App. at 1a-22a). The Circuit Court agreed with the Secretary of the DOE that this statute conflicted with "pre-1992 federal student loan policy," which, according to the D.C. Circuit, only allowed students to assert school misconduct defenses in the "limited

4. In her Petition, the Petitioner claims that "generally" state law allows borrowers to assert seller-based defenses against lenders who "cooperate in arranging student loans." (Petition at 6). This is not necessarily true; the laws of the fifty states vary considerably. Here, once the district court decided D.C. law did not apply, the plaintiff could not assert such a claim under California law.

circumstances" where the school "originated" the loan for the lender. (Petitioner's App. at 16a). The D.C. Circuit held that imposition of liability upon lenders who merely permitted schools to participate in the preparation of loan documents, as provided for under D.C. Code § 28-3809(a), would conflict with the GSLP's purpose "to make student loans attractive to private lenders by protecting them from the financial consequences of student default." (Petitioner's App. at 16a).

In her Petition for a Writ of Certiorari, the Petitioner contends that the District of Columbia Circuit's opinion asserted that the source of this preemptive federal policy was a decision by the staff of the Federal Trade Commission to not enforce the FTC Holder Rule with respect to student loans during the period from 1982 to 1992. (Petition at 12-13). This contention by the Petitioner is not accurate. While the D.C. Circuit did analyze the applicability of the FTC Rule to the Petitioner's student loan, it did so in rejecting the Petitioner's claim that she could "imply" the language of the FTC Rule into her note even though such language was not contained within the note. (Petitioner's App. at 12a-13a). In contrast, in holding that the Petitioner's claim under D.C. Code § 28-3809 was preempted, the D.C. Circuit did not look to or rely upon the FTC Rule at all; it looked only to the Higher Education Act and the Department of Education's regulations and policies regarding the enforceability of student loans. (Petitioner's App. at 16a-17a). Consequently, the Petitioner's entire argument that the Circuit Court's preemption ruling was based on the decision of the FTC to not enforce the FTC Holder Rule with respect to student loans is inaccurate.

REASONS FOR DENYING THE WRIT

This Court should deny certiorari because none of the suggested bases for granting a writ which are articulated in Rule 10 of the United States Supreme Court Rules are present here. First, this case, does not involve an issue sufficiently vital or "important" to the public to warrant this Court's intervention. Second, contrary to the Petitioner's arguments, the D.C. Circuit's opinion is not "inconsistent" with any previous rulings of this Court, or the rulings of any other Circuit Courts of Appeal.

I. THIS PREEMPTION ISSUE, WHICH WAS RENDERED MOOT IN 1993 WHEN THE DEPARTMENT OF EDUCATION MANDATED INCLUSION OF FTC HOLDER NOTICES IN GSLP NOTES, IS NOT SUFFICIENTLY IMPORTANT TO WARRANT SUPREME COURT REVIEW

Supreme Court Rule 10 indicates that the Court will not exercise its discretion to review a decision unless it involves an "important" federal question. However, the D.C. Circuit's narrow ruling in this case is expressly limited to pre-1994 promissory notes that were not required to include the FTC Holder Notices. The Circuit Court repeatedly stated that GSLP borrowers have been entitled to assert school misconduct as a defense to loan repayment (assuming there is a referral or affiliation between the school and lender) since 1993, when the Department of Education began requiring inclusion of the FTC Holder Notices in all GSLP promissory notes. (Petitioner's App. at 2a, 6a, 11a). As the Circuit Court stated:

> Although federal student loan policy **now** recognizes school misconduct defenses against lenders who have "referral relationships" with for-profit schools, appellant obtained her loan in the late 1980s, a time when federal policy protected lenders from such defenses. (Petitioner's App. at 2a). (Emphasis added).

Consequently, for all future GSLP loans and loans made for the last five and a half years, this preemption issue is moot. Since the Department of Education has already given students prospectively the relief that plaintiff seeks to retroactively impose here, a reversal of the lower Court's rulings in this case would help petitioner; but few other students have unresolved claims of pre-1994 school misconduct. A reversal would have little practical effect for other students or future cases, and it is therefore not sufficiently important to warrant the intervention of this Court.

Petitioner attempts to magnify the significance of this decision by claiming that in a "significant portion" of the thousands of student loan collection proceedings, student loan borrowers allege school misconduct as a defense to collection and that the "federal courts have struggled with the question of whether the Higher Education Act preempts these state defenses. . . ." (Petition at 1-2). As an initial point, Petitioner offers no evidence to support her contention that school misconduct defenses are raised in many cases at all. Even if this were true, however, thanks to the Department of Education's 1993 mandate, the "struggle" by federal courts with preemption referred to by the Petitioner is history for all but the few parties still litigating the enforceability of superseded promissory notes. Discretionary Supreme Court review is generally reserved for vital and important federal issues, not academic ones. Petitioner has no evidence that any Court has struggled with these

preemption issues for loans made since 1993. Moreover, as discussed below, the federal courts have not really struggled with this preemption issue. Rather, federal courts have consistently held that the GSLP statutes and regulations preempt state law claims where, as here, they punish compliance with the GSLP requirements and conflict with its goals and policies.

The significance of this issue has diminished for other reasons as well. By the time that the Department of Education allowed borrowers to assert school-based defenses in post-1993 loans, Congress had already imposed a statutory amendment which allowed the Department of Education to terminate the eligibility of for-profit schools with high default rates — the very schools that generate misconduct claims — and thereby reduced the national student loan default rate to only 10.7%. (*See* Pub. L. 102-325, § 427(a), 20 U.S.C. § 1085(a)(2), Petitioner's App. at 5a-6a, and Joint Appendix below at 340). The net effect of these statutory and administrative changes is that while lenders are more legally vulnerable to future claims of school misconduct, the primary source of such claims — shoddy proprietary schools — has been eliminated.

Yet another reason to doubt the importance of the Circuit Court's discussion regarding preemption of D.C. Code § 28-3809 in this case is that it was unnecessary to the ultimate judgment of dismissal. As noted by the Circuit Court, petitioner's standard form promissory note "contained a choice of law clause that subjected the loan contract to the laws of the state of the lender, in this case California." (Petitioner's App. at 8a). Consequently, the District Court held that Armstrong had no claim under the District of Columbia CCPA because the choice of law clause made California law applicable. *Armstrong v. Accrediting Council of Continuing Education & Training*, 980 F. Supp. 53, 59-60 (D.D.C. 1997).

The Circuit Court chose not to determine the validity of the choice of law clause "because we again agree with the Secretary that Armstrong's state law cause of action conflicts with pre-1992 federal policy governing guaranteed student loans." (Petitioner's App. at 16a). Since the same judgment of dismissal is mandated by an adequate and independent state law ground, for the reasons discussed by the District Court and by respondents below, the Circuit Court's preemption ruling was not necessary to the judgment, was somewhat advisory, and therefore is not sufficiently important to demand a response from this Court.

II. THE RULING BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT COURT

A. The Ruling Below Is Not In Conflict With This Court's Decisions On Preemption Of State Law

The Petitioner argues that certiorari should be granted because the preemption ruling of the Circuit Court is "inconsistent" with this Court's prior decisions on preemption. (Petition at 14). As an initial point, Rule 10(c) of the United States Supreme Court Rules makes clear that more than "inconsistency" between the decision of this Court and the court to whom the writ is sought should be established by the Petitioner. That Rule specifically states that the Petitioner should establish that the decision of the lower court "decided an important federal question in a way that *conflicts* with relevant decisions of this Court." (emphasis added). That Rule goes on to state: "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Here, the Petitioner is arguing, at most, that the D.C. Circuit misapplied prior rulings of this Court, not that the D.C. Circuit's decision directly conflicts with any decision of this Court. Under the express standards of Rule 10, this should not be enough to justify granting the petition.

Moreover, contrary to the Petitioner's arguments, the District of Columbia's decision is not inconsistent with the prior decisions of this Court. In finding that D.C. Code § 28-3809 was preempted, the D.C. Circuit relied *on California Fed. Sav. & Loan Assoc. v. Guerra*, 479 U.S. 272, 281 (1987), in which this Court held that federal preemption can be implied where state law "actually conflicts with federal law." (Petitioner's App. at 14a). That is exactly the case here. As the D.C. Circuit recognized, under the GSLP "[T]he Secretary requires eligible schools to perform certain functions to facilitate student access to guaranteed loans, including giving students information on loan availability, certifying student eligibility . . . and forwarding applications to lenders." (Petitioner's App. at 3a). The D.C. Circuit correctly recognized that D.C. Code § 28-3809(a) did conflict with the GSLP, because it would impose liability upon lenders "who do no more than permit schools to participate in the preparation of the loan instruments at the school's request." (Petitioner's App. at 16a).

The GSLP was created with the intention that lenders would usually have no face-to-face contact with borrowers. *See, e.g.*, 54 Fed. Reg. 24125 (June 5, 1989) (comments of the DOE recognizing that schools, not lenders, had to counsel borrowers because lenders often have no face-to-face contact with the borrower). Such "long distance lending" enhanced the ability of participating lenders to make funds available on a nation-wide basis to borrowers attending eligible schools

of their choice. Therefore, the Circuit Court was correct in accepting the Secretary's position that state law claims such as the one at issue here, which imposed liability upon lenders merely because the seller participated in preparing the loan documents, are preempted.

In arguing that the D.C. Circuit Court's preemption ruling is "inconsistent" with prior rulings of this Court, the Petitioner first points to *Puerto Rico Consumer Affairs Dep't v. Isla Petroleum Corp.*, 485 U.S. 495 (1988). (Petition at 15). In that case, oil companies argued that even after the expiration of a federal statute controlling petroleum prices, state laws seeking to regulate such prices remained preempted. This Court held that there was no such preemption "in vacuo, without a constitutional text or federal statute to assert it." *Id.* 485 U.S. at 503.

Isla Petroleum provides the Petitioner with no support at all for her argument. There, as this Court recognized, Congress withdrew from "all substantial involvement in petroleum allocation and price regulation." *Id.* at 504. Here, Congress and the Secretary were and still are actively involved with regulating student loans through the GSLP.

It should be noted that in *Isla Petroleum* this Court also stated:

> Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action. *Id.* at 503.

Here, there was a comprehensive federal scheme governing the GSLP in 1988 which did not impose any

liability for the misconduct of eligible schools upon participating student loan lenders and assignees. This "inaction" by Congress, and by the Secretary, supports the decision of the D.C. Circuit to preempt the application of D.C. Code § 28-3809, because that statute would impose liability where none was intended.

The express intent of the GSL program was to encourage private institutions to make, purchase, and guarantee loans to any eligible student attending an institution certified as "eligible" by the DOE. (*See, e.g.*, 1980 U.S. Code Cong. & Admin. N. p. 3168 ("increase loan availability by making the program more attractive to commercial lenders")). Plaintiff's claims would undermine that legislative purpose. Congress stated its "strong view that lenders ought to confine themselves to making lending decisions and leave education decisions to students, their families and institutions of post-secondary education." (1980 U.S. Code Cong. & Admin. N. p. 3178). That is why certification of eligible schools was delegated to the DOE and accrediting agencies. 20 U.S.C. § 1085(a)-(c) (1988); 34 C.F.R. § 682.600(a)(1) (1988). Lenders were given no supervisory or enforcement role.

The Petitioner also argues that the D.C. Circuit's ruling was inconsistent with this Court's decision in *Freightliners Corp. v. Myrick*, 514 U.S. 280 (1995). (Petition at 17). In *Myrick*, this Court held that in the absence of a federal standard requiring trucks to use antilock braking systems, a state common law negligence action against a trucking company for failure to use such a system was not preempted. The petitioner argues that "[a]s in *Myrick*, there is no federal standard to create a conflict" with her claim under D.C. Code § 28-3809. (Petition at 18).

Once again, the petitioner ignores the basis of the D.C. Circuit's ruling. As the Court expressly noted before analyzing the preemption arguments, the Secretary "requires eligible schools to perform certain functions to facilitate student access to guaranteed student loans." (Petitioner's App. at 3a). It is this federal requirement that is in conflict with a claim under D.C. Code § 28-3809, because that statute would impose liability upon lenders merely because the school was involved in "preparation of the loan instruments." Consequently, here, unlike in *Myrick*, there is ample federal regulation which directly conflicts with the petitioner's state law claim.

As for the petitioner's contention that state laws should not be preempted merely because they impose liability over and above what is authorized by federal law (Petition at 18), once again this argument misses the mark. This is not a case in which there is state liability in addition to that imposed under federal law; this is a case where the petitioner seeks to impose liability upon her student loan lender and assignees simply because they made her a loan in full compliance with a federal program that required the school to participate in the preparation of the loan. As the District Court of the District of Columbia recognized in *Jackson v. Culinary School of Washington*, *supra*, 788 F. Supp. at 1247, D.C. Code § 28-3809(a) is preempted because "[t]he GSL program requires the seller/school to participate in the preparation of the loan documents. . . . At bottom, . . . any school which followed the chain-of-command specified in the HEA would run afoul of D.C. Code § 28-3809(a)(1)."

B. The Decision Below Is Not In Conflict With The Decisions Of Other Circuit Courts Of Appeal

In arguing that the D.C. Circuit's ruling is "inconsistent" with the decisions of other "lower courts," the Petitioner makes a key concession by recognizing that the decisions to which she refers "do not present Circuit Court holdings in direct conflict." (Petition at 21). This concession should eliminate this entire argument as a basis for granting certiorari, because as Rule 10 of the United States Supreme Court states, certiorari will only be granted for "compelling reasons," such as when a United States court of appeals enters a decision "in conflict with the decision of another United States court of appeals on the same important matter."

Of course, the petitioner had to concede that there are no other Circuit Court opinions in conflict with the decision of the D.C. Circuit in this case. First, no other Circuit Court has ever addressed whether D.C. Code § 28-3809(a) is preempted, so no other Circuit Court decisions could conflict with the one at issue here on the question for which the petitioner seeks certiorari. Significantly, D.C. Code § 28-3809 was found to be preempted not only by the D.C. Circuit in this case, but also by the United States District Court for the District of Columbia in both this case, *Armstrong v. Accrediting Council for Continuing Education & Training*, 832 F. Supp. 419, 430-31 (D.D.C. 1993), and in *Jackson v. Culinary School of Washington*, 788 F. Supp. 1233, 1247 (D.D.C. 1992), *rev'd on other grounds*, 27 F.3d 573 (D.C. Cir. 1994), *vacated*, 115 S. Ct. 2573 (1995), *on reconsideration*, 59 F.3d 254 (D.C. Cir. 1995). There are no decisions to the contrary.

Two other Circuit Courts and one state Supreme Court have addressed preemption issues similar to those raised by

the petitioner in this case, and in all those cases the dismissal of such claims was affirmed. In *Veal v. First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990), the Seventh Circuit reviewed a claim brought by a student loan borrower against her lender, guaranty agency and the Secretary seeking to rescind her student loan based upon the misconduct of the school she chose to attend with that loan. The District Court below had dismissed the plaintiff's claims on two grounds; first, because the plaintiff's state law claims were preempted, and second, because the plaintiff failed to state a claim under state law even in the absence of preemption. *Graham v. Security Sav. & Loan*, 125 F.R.D. 687, 693 (N.D. Ind. 1989). The Seventh Circuit declined to address the preemption issue, finding that the plaintiff failed to state a claim in any event. *Veal*, 914 F.2d at 909.

The petitioner tries to convince this Court that the Seventh Circuit decision in *Veal* is "inconsistent" with the D.C. Circuit's ruling in this case based upon a footnote contained at the conclusion of the *Veal* decision, which stated that a borrower sued by lenders in a state court could assert "any defenses available under state law that are applicable to his or her particular loan." *Id.* 914 F.2d at 914-15.

Contrary to the petitioner's contention, by making this statement in a footnote, the Seventh Circuit did not say anything inconsistent with the D.C. Circuit's preemption ruling. In *Veal*, the Seventh Circuit expressly declined to address preemption, and in the footnote the Court merely stated that procedurally, borrowers could assert "available" defenses in a state court collection action, i.e., those that were supported by law and not preempted. *Veal* is not inconsistent in any way with the D.C. Circuit's opinion in this case.

The petitioner's contention that the as yet unpublished decision of the Eleventh Circuit in the case of *Bartels v. Alabama Commercial College*, No. 98-8885 (11th Cir. June 29, 1999), 1999 U.S. App. LEXIS 19902, is inconsistent with the D.C. Circuit's decision in this case is equally unpersuasive. In *Bartels*, the Eleventh Circuit held, as did the D.C. Circuit here, that state law claims seeking to impose liability against lenders for school based misconduct were preempted to the extent they were based on "a relationship between the school and the lenders expressly contemplated, if not mandated, by the HEA." *Id.* slip. op. at 8. The "relationship" between the lender and school that was alleged to exist in *Bartels* was virtually identical to that alleged by the petitioner to exist here. *Id.* slip. op. at 8, n.6. Thus, the holding of the Eleventh Circuit in *Bartels* is not "inconsistent" with the D.C. Circuit's ruling in this case. In fact, it is nearly identical.

Finally, the petitioner claims that the decision of the Arkansas Supreme Court in *Bogart v. Nebraska Student Loan Program*, 313 Ark. 656, 858 S.W.2d 78, 81 (1993) is inconsistent with the D.C. Circuit's opinion in this case. Once again, the petitioner is mistaken. In *Bogart*, the plaintiff claimed that the school acted as the "agent" of the lenders because the lender and school had a long distance lending relationship. Based upon this "agency" theory, the plaintiffs sought to impose liability upon their lenders for the alleged misconduct of the school. The Arkansas Supreme Court ruled that this state law claim was preempted, because it sought to impose liability upon lenders for conduct that "coincide(s) precisely with the conduct outlined in the HEA necessary to put the loan into effect." *Id.* 858 S.W.2d at 81.

Thus, in *Bogart*, state law claims seeking to impose liability upon lenders for school based misconduct were

preempted to the extent they were based upon long-distance lending common under the program. This decision does not conflict with the decision of the D.C. Circuit in this case, it supports it.

CONCLUSION

For the foregoing reasons, Respondents request this Court to deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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